

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Motor Vehicle
Dealer License of Yakim Bemis, Inc.,
d/b/a Dave Yakim Ford, Respondent.

Case No. 96-H-951

FINAL DECISION

On February 9, 1996, the Department of Transportation filed a complaint with the Division of Hearings and Appeals alleging that Yakim Bemis, Inc., d/b/a Dave Yakim Ford violated specified provisions of Ch. TRANS 139, Wis. Adm. Code. The Department is seeking the suspension of Yakim's motor vehicle dealer license.

Pursuant to due notice a hearing was held in Madison, Wisconsin on June 10, 1996, before Mark J. Kaiser, Administrative Law Judge. The parties filed post-hearing briefs. Initial briefs were received on July 10, 1996, and response briefs were received on July 29, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

Wisconsin Department of Transportation, complainant, by

Attorney Charles M. Kernats
Office of General Counsel
P.O. Box 7910
Madison, WI 53707-7910

Yakim Bemis, Inc., d/b/a Dave Yakim Ford, respondent, by

Attorney Gary L. Antoniewicz
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P.O. Box 44158
Madison, WI 53744-4158

The Administrative Law Judge issued a proposed decision on September 20, 1996. The respondent filed comments objecting to the proposed decision on October 4, 1996. No comments on the proposed decision were filed by the Department of Transportation.

In its objections the respondent argues that the violations of sec. TRANS 139.04(6)1, Wis. Adm. Code, found are not grounds for suspension of his motor vehicle dealer license.

Sec. 218.01(3)(a), Stats., sets forth grounds for denial, suspension, or revocation of a motor vehicle dealer license. Sec. 218.01(3)(a)14, Stats., provides that "[h]aving violated any law related to the sale, distribution or financing of motor vehicles" is grounds for suspension of a motor vehicle dealer license. Sec. TRANS 139.04(6)1, Wis. Adm. Code, is a law relating to the sale of motor vehicles. As such, it is grounds for suspension of Yakim's motor vehicle dealer license.

The respondent argues that sec. 218.01(3)(a)4, Stats., not sec. 218.01(3)(a)14, Stats., should apply to this case. Sec. 218.01(3)(a)4, Stats., provides that "[w]ilful failure to comply with any provision of this section or any rule or regulation promulgated by the licensor under this section" is grounds for suspension of a motor vehicle dealer license. The only distinction between these two sections is that sec. 218.01(3)(a)4, Stats., requires a showing that the violation was wilful. The respondent argues that sec. 218.01(3)(a)4, Stats., encompasses all violations of sec. 218.01, Stats., or rules promulgated thereunder, while sec. 218.01(3)(a)14, Stats., encompasses all other laws relating to the sale, distribution or financing of motor vehicles.

This interpretation of the statutes is logical; however, the respondent cites no authority for this interpretation and there is no indication on the face of the two sections that this is what the legislature intended. Moreover, there is no explanation as to why a violation of a provision of sec. 218.01, Stats., or an administrative rule must be shown to have been wilful to be grounds for suspension of a motor vehicle dealer license, while a violation of any other law need not be wilful to be grounds for suspension.

The respondent also argues that these violations do not warrant a suspension of its motor vehicle dealer license. It is unduly harsh to suspend the respondent's motor vehicle dealer license for even one day for the violations found. The findings in the proposed decision finding the violations are adopted; however, the order suspending the respondent's motor vehicle dealer license is not adopted for the reasons set forth in the Discussion section below.

Findings of Fact

The Administrator finds:

Prior to the hearing the parties filed a stipulation of facts. The stipulation included the following relevant facts:

1. The respondent, Yakim Bemis, Inc., d/b/a Dave Yakim Ford (Yakim) is a motor vehicle dealer licensed by the Department of Transportation (Department). Yakim is a Wisconsin

corporation with its business located at 910 W. Murdock, Oshkosh, Wisconsin 54902. David N. Yakim is the sole shareholder and corporate officer of Yakim.

2. On April 20, 1995, Yakim sold a 1992 Lincoln Town Car, VIN 1LNLM82W2NY733950, (Lincoln) to Timothy T. Witzke and Gerald A. Witzke, for a price of \$18,990.00 plus \$949.50 tax and \$16.50 title.

3. Timothy Witzke is 29 years old and resides at 1834 Iowa Street, Oshkosh, Wisconsin. Gerald Witzke is the father of Timothy Witzke and resides at the same address.

4. Title to the Lincoln at the time of its sale by Yakim was in the name of Ford Motor Credit Company, P.O. Box 9100, Southborough, Massachusetts and was a Massachusetts title issued September 16, 1992 when the Lincoln was new.

5. Title to the Lincoln was reassigned by Ford Motor Credit on February 15, 1994 to Quality Auto in Wells, Minnesota. Title was reassigned by Quality Auto to Wells Ford Mercury, Inc., in Wells, Minnesota on March 16, 1994. Title was reassigned by Wells Ford to Reilly Motors in Wautoma, Wisconsin on September 10, 1994 and was reassigned to Yakim by Reilly Motors on October 27, 1994. Issued title remained in the name of Ford Motor Credit Company through its sale to Timothy and Gerald Witzke.

6. Title to the Lincoln is now held in the names of Gerald A. Witzke and Timothy T. Witzke on a Wisconsin Certificate of Title for a Vehicle.

7. From on or about September 16, 1992 until February 15, 1994, Ford Motor Credit Company leased the Lincoln to Reynolds Equipment and Bill Reynolds of Canton, Massachusetts. There is no record of any other private individuals or companies having had use or ownership of the Lincoln except for dealer reassignments as set forth in paragraph 6 above. The lease to Reynolds was a Ford "Red Carpet Lease."

8. The Lincoln had 33,293 miles on its odometer when reacquired by Ford Motor Credit from the lease to Reynolds and 39,894 miles at the time of its sale to the Witzkes.

9. Prior to selling the Lincoln to the Witzkes, Yakim had information that the vehicle was previously leased by Ford Motor Credit Company.

10. At the time of sale of the Lincoln to the Witzkes, the Lincoln had a Used Vehicle Disclosure Label affixed showing the vehicle to have been privately driven. The box for a leased vehicle was not checked.

11. There is no evidence that Timothy or Gerald Witzke were informed that the Lincoln was previously leased under a Ford Red Carpet Lease prior to their purchase of the vehicle.
12. Prior to purchasing the Lincoln, Timothy Witzke was informed by Yakim that the Lincoln had been purchased from Reilly Motors in Wautoma and was titled in Massachusetts. There is no evidence that Timothy Witzke actually saw the vehicle's title prior to its purchase.
13. Timothy and Gerald Witzke completed the purchase of the Lincoln from Yakim without seeking further title information because they believed they could cancel the contract within three days if they decided they did not want to keep the car.
14. Timothy and Gerald Witzke were at Yakim from approximately 4:00 p.m. to 8:00 p.m. on April 20, 1995 completing purchase of the Lincoln. The Lincoln was financed through Bank One in Milwaukee and such fact was known to the Witzkes.
15. On the morning of April 21, 1995, Timothy Witzke's sister, Tammy Redmann, telephoned Dave Yakim to express how unhappy she was with the Witzke transaction taking so long.
16. During the afternoon of April 21, 1995, Timothy Witzke drove to Yakim to see his salesperson, John Manske, to express his unhappiness with his purchase and the financing of the Lincoln.
17. During the afternoon of April 21, 1995, Tammy Redmann contacted Tony Taylor, another salesperson at Yakim, to ask for assistance in getting her brother out of his agreement for the Lincoln because the payments were too much. No action was taken by Tony Taylor.
18. During the afternoon of April 21, 1995, Tammy Redmann contacted Dave Yakim at Yakim to ask that he let her brother out of his contract for the Lincoln because his payments were too high. Tammy Redmann was acting on her brother's behalf at such time although Timothy Witzke may not have known of this contact at the time.
19. Tammy Redmann became involved in the transaction for the sale of the Lincoln on April 21, 1995 because she was "watching out" for her brother who she thought was being taken advantage of.
20. On April 21, 1995, Tammy Redmann contacted the Department about the Lincoln and was told that it must be from another state because Wisconsin had no title record for the vehicle.
21. Approximately one week after the purchase of the Lincoln, either Tammy Redmann or

Gerald Witzke called Reilly Motors about the Lincoln and was informed that the vehicle was titled in the name of Ford Motor Credit company and was possibly a lease or rental vehicle.

22. On May 8, 1995, Timothy Witzke's attorney, David Schultz, wrote Yakim demanding rescission of the purchase agreement for the Lincoln.

23. On May 19, 1995, Timothy Witzke filed a complaint with the Department alleging misrepresentation concerning financing, failure to provide title information at the time of sale, improper disclosure of prior use, and other paperwork issues.

24. The Lincoln was never a "rented" vehicle, but was leased when new by Ford Motor Credit Company to Reynolds Equipment Company in Canton, Massachusetts.

25. Prior to its sale to Timothy Witzke, only one title had been issued on the Lincoln which was a Massachusetts title to Ford Motor Credit Company for its lease to Reynolds Equipment Company. All other owners of the vehicle were motor vehicle dealers who took the vehicle on reassignment of title. The Lincoln was driven approximately 6600 miles by the dealers taking reassignment.

26. Timothy Witzke has not had any problems with the Lincoln's performance, but has not been driving the Lincoln because he does not want the car.

27. Yakim has never previously received any license sanction from the Department and its license has never been denied, suspended or revoked.

Discussion

In addition to the stipulated facts set forth above, the record includes correspondence between the parties, complaint investigation reports, copies of Department policies related to dealer discipline, and transcripts of the depositions of Timothy T. Witzke, Gerald A. Witzke, and Tammy J. Redmann. A brief evidentiary hearing was held in this matter at which the primary testimony related to the reasonableness of any disciplinary action for the violations found.

The Department is seeking a suspension of Yakim's motor vehicle dealer license for two alleged disclosure violations in the sale of a 1992 Lincoln Town Car to Timothy and Gerald Witzke. The alleged disclosure violations are that the used disclosure label affixed to the vehicle at the time it was purchased by the Witzkes did not disclose that the vehicle had been a leased vehicle and that it disclosed the vehicle as privately driven when it had been a leased vehicle.

Yakim admits that it failed to disclose the vehicle's past use as a leased vehicle. It contends; however, that the vehicle was leased for personal use; therefore, the disclosure as privately driven was accurate.

The record contains no evidence related to how the vehicle was used by Bill Reynolds or Reynolds Equipment. Section TRANS 139.02(10), Wis. Adm. Code, defines "privately driven" for disclosure purposes as "a privately owned, non-lease motor vehicle." By definition; therefore, the vehicle was not privately driven and the disclosure was inaccurate.

Both inaccurate disclosures are violations of sec. TRANS 139.04(6)1, Wis. Adm. Code. Section TRANS 139.04(6)1, Wis. Adm. Code, is a law relating to the sale of motor vehicles. Pursuant to sec. 218.01(3)(a)14, Stats., a violation of a law relating to the sale of motor vehicles constitutes grounds for suspension, revocation, or denial of a motor vehicle dealer license. The respondent argues that the appropriate subsection of sec. 218.01(3)(a), Stats., to consider is 4, not 14.¹ Section 218.01(3)(a)4, Stats., includes the element of willfulness which Sec. 218.01(3)(a)14, Stats. does not. The Department does not allege that the disclosure violations were willful. Yakim's argument that the sec. 218.01(3)(a)4, Stats., should apply to this matter, rather than sec. 218.01(3)(a)14, Stats., is not persuasive.

Yakim cites as authority for its contention Frank Lloyd Wright Foundation v. Wyoming, 267 Wis. 599, 66 N.W.2d 642 (1954). The court in Frank Lloyd Wright Foundation, adopts a rule of statutory construction stated at 50 Am. Jur., Statutes, p. 371, sec. 367. The court quotes Am. Jur. as follows:

¹Section 218.01(3)(a), Stats., sets forth various grounds for the denial, suspension, or revocation of motor vehicle dealer licenses. Specifically, sec. 218.01(3)(a)4., Stats., provides:

Wilful failure to comply with any provision of this section or any rule or regulation promulgated by the licenser under this section.

And, sec. 218.01(3)(a)14, Stats., provides:

Having violated any law relating to the sale, distribution or financing of motor vehicles.

"... where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provisions."

267 Wis. 599, at 608.

The instant case is distinguishable from Frank Lloyd Wright Foundation.² The two provisions of sec. 218.01(3)(a), Stats., involved are not a specific and general one. Rather sec. 218.01(3)(a)4, Stats., includes an additional element, not in sec. 218.01(3)(a)14, Stats., the element of willfulness. The situation is more analogous to a lesser, included offense, as opposed to a general versus more specific provision.

Sec. 218.01, Stats., has been enacted in a piecemeal fashion. It is undeniable that overlap exists in numerous provisions of sec. 218.01(3)(a), Stats. For example, secs. 218.01(3)(a)5 and 8, Stats., also substantially overlap.³ However, it would be contrary to the legislative intent to ignore some of the provisions of sec. 218.01(3)(a) because they overlap with

²The issue in Frank Lloyd Wright Foundation is whether an association known as the "Taliesin Fellowship" was tax exempt under the provisions of sec. 70.11, Stats. The court after determining the Taliesin Fellowship was not a tax exempt educational institution under the provisions of either sec. 70.11(3) or (4), Stats., also found that it was also not exempt as a corporation "formed solely for the purpose of encouraging the promotion of the fine arts" pursuant to sec. 70.11(4), Stats. 267 Wis. 599, at 607. The conclusion of the court was based in part on its interpretation that the legislature did not have teaching institutions "in mind as qualifying as an institution for the promotion of fine arts." *Id.*, at 608. The court found that a teaching institution that did not qualify for the more specific tax exemption as an educational institution could not be considered for the more general exemption as an institution for the promotion of fine arts.

³Sec. 218.01(3)(a)5, Stats., provides:

Wilfully defrauding any retail buyer to the buyer's damage.

And, sec. 218.01(3)(a)8, Stats., provides:

Having made a fraudulent sale, transaction or repossession.

other provisions.

The next issue to be considered is whether the violation of sec. 218.01(3)(a)14, Stats., constitutes a reasonable basis for suspension Yakim's motor vehicle dealer license. The Department is requesting a one day suspension of the license. Yakim has not been the subject of any disciplinary actions in the past. There is also no evidence in the record that the violations were anything but unintentional mistakes. It is unreasonable to suspend Yakim's motor vehicle dealer license for even a minimal length of time as a result of these violations. The finding of the violations should serve as sufficient deterrence that the respondent will not commit the same or similar violations again. Consumers will be adequately protected without further disciplinary action.

Conclusions of Law

The Administrator concludes:

1. The failure of employees of Yakim Bemis, Inc., to disclose the previous use as a lease vehicle of the 1992 Lincoln Town Car purchased by Tim and Gerald Witzke is a violation of sec. Trans 139.04(6)1, Wis. Adm. Code. Pursuant to sec. 218.01(3)(a)14, Stats., this violation constitutes grounds for the suspension of the motor vehicle dealer license of Yakim Bemis, Inc.
2. The disclosure by employees of Yakim Bemis, Inc., of the 1992 Lincoln Town Car purchased by Tim and Gerald Witzke as "privately driven" when the vehicle had previously been used as a lease vehicle is a violation of sec. Trans 139.04(6)1, Wis. Adm. Code. Pursuant to sec. 218.01(3)(a)14, Stats., this violation constitutes grounds for the suspension of the motor vehicle dealer license of Yakim Bemis, Inc.
3. Under the circumstances, the violations of sec. Trans 139.04(6)1, Wis. Adm. Code, do not constitute reasonable grounds for the suspension of the motor vehicle dealer license of Yakim Bemis, Inc., or any other disciplinary sanction.
4. Pursuant to secs. 218.01(3)(c) and 227.43(1)(bg), Stats., the Division of Hearings and Appeals has the authority to issue the following orders.

Order

The Administrator orders:

Yakim Bemis, Inc., is found to have violated sec. Trans 139.04(6)1, Wis. Adm. Code.

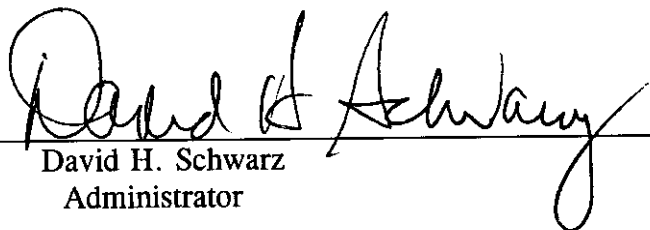
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No disciplinary sanction will be imposed for these violations.

Dated at Madison, Wisconsin on October 24, 1996.

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By


David H. Schwarz
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Division. This notice is provided to insure compliance with §227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to §227.49, Stats. Rehearing may only be granted for those reasons set out in §227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under §§227.52 and 227.53, Stats.
2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of §§227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of §§227.52 and 227.53, Stats., to insure strict compliance with all its requirements.